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REVOCATION OF DEVISE OF REALTY BY SUBSEQUENT SALE—RIGHT OF DEVISEE IN UNPAID PUR- CHASE MONEY.

A case which will probably be of interest to Virginia lawyers, and involving the construction of § 2520 of the Code of Virginia, has recently been decided by the Circuit Court of the County of Prince Edward. As a petition for an appeal, accompanied by the record, was presented to the Supreme Court of Appeals, first to each of the five judges in vacation, and finally before the full court sitting at Staunton in September, 1916, and refused, and the decree of the lower court confirmed, the decision of the Circuit Court is now the law of the state, and has the same effect as if an appeal had been allowed and the decree of the lower court confirmed by a formal opinion handed down by the Supreme Court of Appeals.

The case in question was that of C. M. Thackston and others *v.* E. A. Peters Adm'r, argued before Judge George J. Hundley of the Circuit Court of the County of Prince Edward, and decided at the May Term, 1916. A. B. Dickinson, of Richmond, and Watkins & Brock, of Farmville, attorneys for the complainants, and Coleman, Easley & Coleman, of Lynchburg, attorneys for the defendant.

The facts briefly are as follows: Mrs. E. A. Peters by the second clause of her will, which was dated the 2nd day of July, 1913, devised to Rosa E. Blanton her house and lot on Second Street in the Town of Farmville, Va., in the following words: "I give to my dear little friend, Rosa Elizabeth Blanton, my house and lot on Second Street in the Town of Farmville, now occupied by Mr. Mason Bliss." Subsequently, to-wit: on the 9th day of July, 1914, the testatrix sold and conveyed to Mason Bliss this identical lot, receiving therefor \$1,500 cash, and taking from the purchaser five notes of \$700 each, secured by a deed of trust on the same property. The deed and deed of trust were executed contemporaneously. Early in February, 1915, Mrs.

Peters died, and the will was duly admitted to probate, and Rosa E. Blanton, the person named in the will, qualified as Administratrix, c. t. a., and claimed that under the will she was entitled to the five notes, or the proceeds thereof, the unpaid purchase money, and invoked § 2520 of the Code of Virginia to sustain her position.

C. M. Thackston and the other heirs at law of Mrs. E. A. Peters filed their bill in the Circuit Court of Prince Edward County, claiming the revocation of the devise by the subsequent sale of the house and lot by the testatrix, asking a construction of the will and praying that the notes, or the proceeds thereof, be turned over to them as the heirs at law and next of kin of Mrs. E. A. Peters. As it was conceded that had Mrs. Peters sold the land and received the entire consideration thereof in her lifetime, the devise would have been revoked, the whole question turns on the construction of § 2520 of the Code of Virginia, which is as follows:

"No conveyance or other act subsequent to the execution of a will, shall, unless it be an act by which the will is revoked as aforesaid, prevent its operation with respect to such interest in the estate comprised in the will as the testator may have power to dispose of by will at the time of his death."

(Note). The words, "is revoked as aforesaid" in this statute have reference to preceding sections with reference to cancellation, tearing, or etc.

It seems somewhat strange that this case has never before risen in Virginia. It is true that in the case of *Cullups v. Smith*, 89 Va. 258, this Section of the Code was considered and a subsequent alienation held to be a revocation, but there the whole consideration was paid in cash, so that the question of the deferred payments secured by a deed of trust giving the testatrix an interest did not arise. Moreover, very few of the states seem to have had this question before them. It is true that New York had a statute somewhat similar, that statute reading as follows:

"A conveyance, settlement, deed, or other act of a testator by which his estate or interest in the property, previously devised, or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property, but such devise or bequest, shall

pass to the devisees or legatees, the actual interest of the estate of the testator, which would otherwise descend to his heirs or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared that it shall operate—as a revocation of such previous devise or bequest."

This New York statute was construed in the case of *Adams v. Winne*, 7 Paige 97, in the first paragraph of the syllabus of which reads as follows:

"Where W. —— by his will devised to his two sons certain portions of his real estate, and charged them with the payment of his debts, and also devised certain portions of his real estate to his two daughters, and then gave all the rest of his property to his four children, to be equally divided between them, and after the making of his will, sold and conveyed one of the lots devised to his daughters, for \$3,000, and received on the sale one-sixth of the purchase money, and a bond and mortgage on the lots sold for the residue, and W., the testator died, leaving the bond and mortgage uncollected, *held*, that the sale of the lot and taking back of the bond and mortgage for the purchase money was a revocation of the devise of the lot to the two daughters and that the bond and mortgage passed to the four children, under the residuary clause of the will."

This case, therefore, takes essentially the same view as that taken by Judge Hundley in his decision.

The question is also discussed in *Beck v. McGillis*, 9 Barb. 52-56. Also in *McNorton v. McNorton*, 34 N. Y. 201. See also, note of *Graham v. Birch*, 28 Am. St. Rep. 356-7. 1 Jarman on Wills, pp. 129-146. 1 Sugden on Vendors, 10th Edition, p. 301. Redfield on Wills, 4th Edition, p. 340. In Virginia, the recent case of *May v. Sherards' Legatees*, 115 Va. 617, 79 S. E. 1027, while not directly in point, indicates very clearly the attitude of the court. In that case, a testatrix devised a certain house and lot in the city of Staunton, to be sold and the proceeds paid over to her two nephews. She subsequently sold this house and invested the bulk of the proceeds arising therefrom in a house in the city of Roanoke. She took the precaution, however, to earmark the transaction by a codicil to her will, in which she stated that since writing the will, she had sold the house devised, and had invested the greater portion of the proceeds in a house in

Roanoke. Here, it appears that the testatrix meant the house in Roanoke to be substituted for the house at Staunton, *but she did not say so*, and the court held that by this sale, there was a complete revocation, and that the devisee took no interest in the Roanoke property.

Let us glance for a moment at the history of the Virginia Statute. Under the common law, to quote the words of Jarman on Wills, 1 Vol., p. 167:

"It was essential to the validity of a devise of freehold lands that the testator should be seized thereof at the making of the will, and that he should continue so seized without interruption until his decease. If, therefore, a testator subsequent to his death, by deed, aliens land, which he had disposed of by will, and afterwards acquired a new freehold estate in the same land, such newly acquired estate would not pass by the devise and was necessarily void."

In fact, so far have courts gone in this direction, that where a testator parted with the title for any purpose and afterwards, before his death, again acquired title, and died seized of the same land, the revocation was complete, and the devise failed. Not only so, but it has been held that an executory contract made by the testator subsequent to the execution of his will, and afterwards rescinded, would revoke the devise. *Walton v. Walton*, 7 Johns N. Y. 259, 11 Am. Dec. 456. So again, where a man made a will devising his lands, and then exchanged those lands for others, and died: if the exchange was vacated subsequent to the testator's death, this would not revive the devise, and the same principal is followed in the matter of equitable interests. It would seem, therefore, that it was for the purpose of meeting this situation that the statute above referred to and that making the will speak as of the death of the testator was passed in the seventh year of William the Fourth and again in the reign of Victoria, St. 1 Vic. c. 26, from which our statute was taken. This statute was first enacted by our Legislature in 1849, and the report of the revisors referred to the English Statute. But for one or two words which do not affect the meaning of the statute, ours is almost verbatim the English Statute. It is well settled in this state that where a statute is taken from another state, or a foreign country, and that statute has been construed

by the courts of that state or foreign country, that the Legislature enacting such a statute is presumed to have adopted the construction placed upon it by the courts of the state or country from which it is taken. *N. & W. R. R. Co. v. O. D. Baggage Co.*, 99 Va. 111, 113, 116; *N. & W. R. R. Co. v. Cheatwood*, 103 Va. 356, 366-7; *C. & O. R. R. Co. v. Pew*, 109 Va. 288; *N. & W. R. R. Co. v. Commonwealth*, 111 Va. 59, 68; *Mangus v. McClelland*, 93 Va. 786, 789.

This English Statute was construed in the case of *Farrar v. Earl of Winterton*, decided in the Rolls Court in 1842 before Lord Longdale, Master of the Rolls, and reported in 5 *Bivans Rep.* This was the case in which the testator, Anna Chapman, devised certain freehold estate to parties named in the will and by a codicil, willed a portion of said real estate to the Earl of Winterton, and the remainder to his children. The will was dated Dec. 17, 1834. Subsequently, on the 8th day of January, 1839, the testator entered into a written contract to sell certain portions of the real estate to Luke Farrar for the sum of £2,250 part cash, and with the understanding that upon receiving the balance of the purchase price, a conveyance would be executed to the purchaser. Before the conveyance was made, the testator died, and the heirs of Lord Winterton claimed they were entitled to the money. The court, however, in construing this statute, said that while the testator had entered into a contract by which she agreed to sell her whole interest in the estate, though she did not revoke the will in any of the specified ways, yet, by this act, she revoked as effectively as if she had done so in the modes mentioned in the preceding sections of the statute; that if she had actually conveyed the land, there would be no question about the revocation, and that since she had contracted to sell her beneficial interest, in equity, she had alienated the land, and instead of the beneficial interest in the land, that she had acquired a title to the purchase money. "What was really hers in right and equity *was not the land*, but the money, of which alone she had a right to dispose; and though she had a lien upon the land and might have refused to convey until the money was paid, yet, that lien was a mere security, in or to which she had no right or interest, except for the purpose of enabling

her to obtain the payment of the money. The beneficial interest in the land which she had devised was not at her disposition, but was by her act wholly vested in another at the time of her death."

It has long been recognized that the proceeds of the sale of real estate previously devised is not real estate, but personal property.

Another phase of the question, and incident to the main question of the construction of the statute, is what is the nature of a deed of trust? Is it merely a lien and security for a debt, or, has it some quality which would give the beneficiary an interest in the real estate itself? Does the holder of the notes for deferred payments on land secured by deed of trust have any interest in the land itself? This question has been passed upon by the Virginia courts on more than one occasion, and the law well settled. It is true that commentators, and sometimes our own courts, speak of the creditor secured by a deed of trust, as being a purchaser, but he is the purchaser only under the Registry Act, and in a recent decision, namely: that of *Augusta National Bank v. Beard*, 100 Va. 687, Judge Cardwell delivering the opinion of the court on page 691, said: "A mortgage is but a mere security for the debt and collateral to it." And on the same page, "these authorities without doubt establish the principal that a mortgage is a security and is no part of the land upon which it rests. It is true that one who has acquired a direct interest in land by way of a lien, or by mortgage, or by deed of trust, is often referred to by commentators and the courts as a purchaser, but this does not mean that a creditor secured by a deed of trust has an interest that amounts to a right of property in the land. A deed of trust creditor or mortgagee has no estate in the land that a judgment would bind." And again on the same page, quoting from *Runkle v. Runkle*, 98 Va. 663, in speaking of a creditor secured by a deed of trust, says: "He is simply regarded in the light of a purchaser within the meaning of the Registry law." See also, *Gordon v. Rixy*, 76 Va. 694; *Penn v. Hearon*, 94 Va. 773; *Jones on Mortgages*. §§ 11-12. Also, in the case of *Swann v. Young*, 36 Va. 57, the court says:

"The trust creditor has no estate upon condition like the old mortgagees in the time of Littleton. He has at no time by virtue of his deed of trust, an estate of any kind. He has a chose in action, made a specific lien by contract, and not by change of possession, on a certain tract of land, and there never comes a time when he, or his representatives, has more or other than that; nor has he at any stage, the right to possession unless it is especially given him by the deed, a thing rarely done, and not done in this case."

The question of the construction of this statute and also the nature of a deed of trust will be found discussed in the first volume of Jarman on Wills, Second Edition, pp. 166-180, but especially on pp. 178-180. Other authorities bearing on this subject in one way or the other are the following: *Emory v. Union Society of Savannah*, 79 Me. 334, 341; 30 Am. Eng. Enc. of Law, 2 Ed., p. 654; *Vandemark v. Vandemark*, 26 Barb. 416; Am. Eng. Enc., Vol. 20, p. 902; *Chambers v. Kearns*, 59 N. C. 280; 49 Am. Dig. Cen. Ed., pp. 603-4. Additional references to the nature of a deed of trust are *Brobst v. Brock*, 10 Wall. 519, 529; *Hale v. Horn*, 21 Gratt. 112-121; *Jones on Mortgages*, §§ 11-12; *Hughes v. Edwards*, 9 Wheat. U. S. 484-500.

The decree of the Circuit Court of Prince Edward County reads as follows:

"It appearing to the court from the evidence in this case that the house and lot on Second Street in the Town of Farmville, Va., devised by the second clause of the will of Mrs. E. A. Peters to Rosa Elizabeth Blanton, was sold by the testatrix in her lifetime to one, Mason Bliss, and duly conveyed to him, taking therefor bonds secured by a deed of trust for the deferred payments, the court is of the opinion that by this act, the testatrix fully converted the realty mentioned in said will into personalty, which personalty passes to the Administratrix of Mrs. E. A. Peters, and that nothing remains to pass as an interest in real estate under the said will to the said Rosa Elizabeth Blanton; and consequently that § 2520 of the Code of Virginia can have no application to the case at bar, and hence, that the sale of the said property in the lifetime of the testatrix was a revocation of the devise to Rosa Elizabeth Blanton of the said house and lot; the court doth accordingly so adjudge. order. and decree."

The order of the Supreme Court reads as follows:

"VIRGINIA:

*In the Supreme Court of Appeals held at the court house thereof
in the City of Staunton on Friday, the 8th day of September,
1916.*

C. M. THACKSTON ET ALS,

v.

E. A. PETERS' ADM'R ET ALS.

The petition of Rosa E. Blanton, in her own right and as administratrix of E. A. Peters, deceased, for an appeal from a decree of the Circuit Court of Prince Edward, entered on the 19th day of May, 1916, in the cause then therein pending of C. M. Thackston et als v. E. A. Peters, Administratrix et als, having been heretofore refused by the judges of this court in vacation, the petitioner under § 3466 of the Code of Virginia tendered again in open court her petition for an appeal, and the court having maturely considered the petition aforesaid, and the transcript of the record of the decree having been seen and inspected, the court being of opinion that the said decree is plainly right, doth refuse the said appeal asked for, the effect of which is to affirm the decree of the said Circuit Court."

ROBT. BROCK.